IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-1650

ELISEO GARZA,
Petitioner

v.

AMADOR RODRIGUEZ,
Respondent.

REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Respondent, Amador Rodriguez, prays that a writ of certiorari not be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on September 14, 1977, in favor of Amador Rodriguez.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 559 F.2d 259 (5th Cir. 1977). The Judgment and Memorandum of the District Court are unreported; they are set forth *infra* in the Appendix at pages 1a and 4a, respectively.

STATEMENT OF THE CASE

On Saturday, December 20, 1975, at about 1:30 a.m., Rodriguez was routed out of bed by a phone call from the jail (Trial Appendix 219). Petitioner had been arrested while in an inebriated condition and had requested the call (Trial Appendix 188-89). The District Court's Memorandum and Order (Appendix 4a-10a) adequately relate the circumstances which preceded Rodriguez' trip to the jail, including petitioner's inebriated condition, his failure to show his driver's license when requested to do so by the police officer, his belligerency, his demand for some sort of preferential treatment because he was a probation officer, and his abuse of the jail officials and foul language to everyone who seemed to be close at hand when he was being booked.

In any case, Rodriguez immediately went down to the jail to try to help petitioner (Trial Appendix 87, 207).

When Rodriguez arrived at the jail petitioner was still swearing (Trial Appendix 49) and saying he was going to "get" the police officer who arrested and allegedly abused him (Trial Appendix 49, 244). Petitioner cursed him along with everybody else (Trial Appendix 306, 188, 194, 222). He kept jabbing Rodriguez in the chest, referring to him as a "son of a bitch" (Trial Appendix 220, 244-45).

With commendable restraint and patience, Rodriguez managed to get his subordinate cooled down (Trial Appendix 221, 151). He arranged for petitioner to be released on his own recognizance, with the understanding that petitioner would return the following Monday and post his bond (Trial Appendix 50, 78, 221).

During the next day or two, Rodriguez informed petitioner that because of the December 20 incident, he might be suspended for ninety (90) days or he might be discharged (Trial Appendix 223).

Several weeks passed, during which time nothing was said between Rodriguez and petitioner in regard to the December 20 incident. On Friday morning, February 6, Rodriguez learned, for the first time, from the First Assistant County Attorney, that petitioner might file a suit against the Brownsville police. Rodriguez called petitioner in and told him that petitioner should have brought this to his attention and that petitioner should have kept him abreast of the situation; that petitioner should have informed him ". . . out of respect for my position . . . ," because the suit would have an effect upon the rapport and relationship between the police department and the probation department (Trial Appendix 226, 246-50, 253). Petitioner's argumentive response was ". . . that I didn't help him get a lawyer" (Trial Appendix 249). Later, in the afternoon, Rodriguez notified petitioner of his decision to terminate him, after consulting with his superior, Judge Hester, (Trial Appendix 226-27) and promised him a letter which was provided petitioner the next Monday (Trial Appendix 224). Rodriguez testified that, in his decision, he took everything into consideration over the total time after the December 20 incident and had finally concluded that petitioner's conduct would have a detrimental effect on his department and that it was better to release him (Trial Appendix 227). Rodriguez stated also that the decision was a hard one, as petitioner was a good worker (Trial Appendix 228, 226).

Petitioner's testimony differs somewhat from that of Rodriguez. Petitioner recalled a February 4 conversation with petitioner relating to the possibility of filing a lawsuit against the police. When asked by Rodriguez if he was going to file suit, petitioner testified that his response was "We're not definite on this." (Trial Appendix 53). Later on petitioner evidently made up his mind to actually file the suit for he did so on February 19 (Trial Appendix 3, 57), although he did not get out his process on it to the police department until April 29 . . . one week before the instant suit was tried (Trial Appendix 76-7).

As of February 6, however, petitioner fully understood he would be terminated (Trial Appendix 60), and that the firing was because of his conduct on December 20 (Trial Appendix 71, 80, 81). Each step of the way after February 4, Rodriguez so expressed himself (Trial Appendix 73, 71).

Petitioner was not finally released from his duties, however, until March 15 and continued on the payroll thereafter on a vacation status until March 31 (Trial Appendix 61). The present suit was then brought under 42 U.S.C. § 1983 on April 1, 1976—one day after petitioner's pay with the County ceased.

At the completion of the trial, the jury made several determinations by way of Special Interrogatories Nos. I-V (Appendix 1a-2a). After trial, the District Court made further supplemental findings in its Memorandum and Order (Appendix 4a-10a). The District Court ordered petitioner's reinstatement, but agreed with the jury findings and awarded no damages nor back pay. Rodriguez and the County appealed the granting of in-

junctive relief and petitioner cross-appealed the denial of back pay. The Court of Appeals for the Fifth Circuit reversed the District Court's grant of injunctive relief and affirmed the denial of back pay.

REASONS FOR DENYING THE WRIT

POINT ONE

THE COURT OF APPEALS FOR THE FIFTH CIRCUIT CORRECTLY DECIDED THAT PETITIONER DID NOT ENGAGE IN CONSTITUTIONALLY PROTECTED CONDUCT WHICH SERVED AS A SUBSTANTIAL FACTOR FOR RODRIGUEZ' DECISION TO FIRE PETITIONER.

The Court of Appeals for the Fifth Circuit squarely held that the two areas of conduct which petitioner argues to be constitutionally protected conduct were, as a matter of law, not constitutionally protected conduct. The Court stated that:

> "*Garza's behavior and speech* at the police station on *December 20, 1975, had no constitutional* first amendment *protection.*" 559 F.2d at 260. (Emphasis added)
>
> "Under the circumstances, *neither the formed intention to file the lawsuit, nor the filing of the lawsuit was constitutionally protected conduct* which would prevent Garza's employer from using that as a part of the reason for firing him." 559 F.2d at 262. (Emphasis added)

Petitioner's behavior and speech at the police station on December 20, 1975, failed to have First Amendment protection because lewd, obscene, profane, slanderous "fighting words" are not entitled to constitutional protection. *Chaplinsky v. New Hampshire,* 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031 (1942). *Megill v. Board of Regents,* 541 F.2d 1073, 1085 (5th Cir. 1976).

Regarding petitioner's "formed intention to file the lawsuit," the Court of Appeals used the District Court's Memorandum and Order as a springboard to apply the underlining equitable concepts of *Mt. Healthy City Board of Education v. Doyle,* 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977). Tex. Rev. Civ. Stat. art. 5142 (Vernon, 1971) empowers petitioner's employer to fire him *at any time,* for any reason, or even for no reason. Noting that the District Court found that the December 20, 1975, conduct justified Garza's termination, the Court of Appeals held that the alleged expressed intent to file suit could not, under *Mt. Healthy,* be used to insulate Garza from being fired. As this Court stated in *Mt. Healthy:*

> *"The constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct.* A borderline or marginal candidate should not have the employment question resolved against him because of constitutionally protected conduct. But that same candidate ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, *simply because the protected conduct makes the employer more certain of the correctness of its decision."* 429 U.S. at 285-86. (Emphasis added).

The failure of petitioner to advise Rodriguez of his decision to file suit against the police indicated a lack of respect by petitioner for Rodriguez' position, and understandably, made Rodriguez more certain of the correctness of his decision to fire petitioner. No constitutional principle was contravened by terminating him when he planned an act which . . . though constitutional in itself . . . is conducted in a manner and under circumstances suggesting disloyalty, surreptitiousness and unfairness to the persons and organization whom the employee purports to serve.

It should be noted that petitioner's testimony is unclear as to whether (on February 6) he had yet decided to file suit. Petitioner testified that on February 4 he had told Rodriguez that "We're not definite on this." (Trial Appendix 53).

Yet, petitioner argues that the Court of Appeals below ruled that he met his burden of proving that a constitutionally impermissible reason (allegedly intending to file a lawsuit) was a motivating factor for his termination (Petition at 8-9). Quite the opposite is true. The Court of Appeals' opinion explicitly states that Petitioner's alleged formed intention to file a lawsuit, while a motivating factor in Rodriguez' decision, was *not* constitutionally protected conduct. 559 F.2d at 262. Petitioner has simply not met his burden; and in reversing the District Court's judgment, the Court of Appeals so decided. Thus, the petitioner has either misunderstood or is seeking to circumvent the basis of the Court of Appeals' decision.

POINT TWO

THERE EXISTS NO REQUIREMENT THAT A JURY DETERMINATION BE MADE AS TO WHETHER RODRIGUEZ WOULD HAVE FIRED PETITIONER IN THE ABSENCE OF CONSTITUTIONALLY PROTECTED CONDUCT.

Mt. Healthy balances the equities between the employer and the employee. *Mt. Healthy* holds that the employer is not automatically constitutionally forced to either rehire or forced not to fire an employee simply because the employee has engaged in constitutionally protected conduct and such conduct is but one reason to fire or not to rehire. 429 U.S. at 285-86. *Mt. Healthy's* bifurcated "could-would" approach is conditioned on an initial showing by the employee that constitutionally protected conduct served as a motivating factor in the employer's decision not to rehire or to fire. If this initial burden is not met by the employee, then there is, of course, no need for the employer to show that would have reached the same decision even in the absence of the protected conduct.

As pointed out above, the initial burden of proving the existence of constitutionally protected conduct had not been met. The facts in *Mt. Healthy* included constitutionally protected conduct whereas the case at bar does not. Therefore, that portion of petitioner's Petition which discusses the "could-would" distinction of *Mt. Healthy* is of only hypothetical interest.

POINT THREE

PETITIONER ARGUES THAT THE COURT OF APPEALS FOR THE FIFTH CIRCUIT "EFFECTIVELY REDETERMINED FACTS FOUND BY A JURY," WHEN IN TRUTH THAT COURT CORRECTLY APPLIED CONSTITUTIONAL STANDARDS.

It is somewhat unclear from petitioner's Petition just which facts found by the jury were effectively redetermined by the Court of Appeals. (Petition at 10-12). Presumably, the primary complaint by petitioner is that the Court of Appeals determined that Rodriguez would have fired petitioner because of his December 20, 1975, conduct, despite the existence of the alleged formed intention to file a lawsuit. Again, any such determination would be both dictum and academic in light of the fact that the Court of Appeals decided that neither the post-firing filing of the lawsuit, the (alleged) formed intention to file the lawsuit, nor the December 20, 1975, conduct was constitutionally protected conduct.

The best example of a redetermination of facts, actually found by a jury is located at page 10 of petitioner's Petition. This Court is misled by the following paragraph:

> "In fact, the employer had claimed and tried to prove termination was 'primarily based on [his] conduct on December 20 . . .', (see p. 14a), but the jury did not believe that claim and found, to the contrary, that the *'primary reason'* for termination was the *intended suit.*" (emphasis added)

The relevant interrogatory is as follows:

> "We, the jury, find that the principal reason Amador Rodriguez decided to discharge Eliseo Garza was that he criticized the police before his employer and others, [on December 20, 1975] and because Mr. Garza eventually filed suit against officers of the Brownsville Police Department." (Special Interrogatory No. 1, Appendix at 1a).

This interrogatory states that the principal reason Rodriguez discharged petitioner was because petitioner criticized the police in the presence of Rodriguez and other persons. The interrogatory goes on to state that another reason, but not the principal reason, was because petitioner eventually *filed* suit. The jury did not find that petitioner's allegedly formed *intent* to file suit was a motivating factor in Rodriguez' decision. Yet, petitioner attempted to mislead the Court by stating the:

> "The 'primary reason' for termination was the intended suit."

In total, all jury special interrogatories contain only a few jury "facts". However, rather than ignoring or redetermining these facts as petitioner argues, the Court of Appeals fully integrated these "facts" either directly or indirectly into its decision. As an example, since neither the December 20 conduct nor the eventual filing of suit against the police department (Special Interrogatory No. 1); constituted constitutionally protected conduct (559 F.2d 262), then Rodriguez reasonably should not have known that his actions would violate constitutional rights of petitioner (which, of course, were not violated). (Special Interrogatory No. V).

Interestingly, the jury did not find the existence of constitutionally protected conduct. Special Interrogatory No. V is the only finding requested of or made by the jury which speaks to the question of the lawfulness of Rodriguez' subjective motives and, in this, the finding is adverse to petitioner. Only in the District Court's supplemental findings is there a specific finding that petitioner's rights of freedom of expression and due process of law were violated. (Appendix at 3a). The disagreement by the Court of Appeals with the District Court's legal conclusions is not a Seventh Amendment prohibition.

POINT FOUR

THE DISTRICT COURT WOULD HAVE FOUND THAT RODRIGUEZ WOULD HAVE FIRED PETITIONER EVEN IN THE ABSENCE OF THE ALLEGEDLY DECLARED INTENTION TO FILE SUIT.

For purposes of argument under Point Four, Rodriguez must assume arguendo that:

1. The Court of Appeals ruled that petitioner met his initial burden of showing that a constitutionally impermissible reason was a substantial factor in Rodriguez' decision to fire petitioner; and

2. That the allegedly declared intention to file suit constituted constitutionally protected conduct.

As pointed out above, Rodriguez concedes neither assumption.

If such assumptions are made, *Mt. Healthy* shifts the burden to Rodriguez to prove that his decision would have

remained the same despite the allegedly declared intention to file suit. The question then becomes whether the Court of Appals could properly make the determination that the District Court would have decided, if presented with the question, that Rodriguez would have fired petitioner in the absence of the allegedly declared intent to file suit. Unquestionably, the answer would be affirmative.

The Court of Appeals summarized various aspects of the case, which, when analyzed, relate what conclusions the District Court would have reached had the District Court ruled on the question. The Court of Appeals stated:

> "The district judge found the County could have fired Garza because of his conduct of December 20, the basis of the termination notice given to Garza by Rodriguez: 'My decision is primarily based on your conduct of December 20, 1975, which I regard as unbecoming an officer of this department.'"
>
> * * *
>
> "Shortly after the December 20 incident, Rodriguez informed Garza he could be put on probation or dismissed. About six weeks later, when Rodriguez learned from others of the intended lawsuit, he told Garza that he should have been advised of Garza's intentions regarding a suit against the Police Department. He was upset because Garza had not approached him on the matter and thought it indicated a lack of respect for his superior's position. After conferring with the juvenile court judge as to what action should be taken, he gave the termination notice. Several weeks later, Garza filed suit against the police. Presumably, however, once Garza's attitude was revealed by the declared intention to file the lawsuit without consulting his superiors, he was fired, and would have remained so, whether or not he later filed a lawsuit." 559 F.2d at 261.

Undoubtedly, despite the allegedly declared intent to file a lawsuit, petitioner would have been fired.

In further reply to petitioner's argument (Petition at 11), it would appear that Special Interrogatory No. 1 demonstrates that the jury accepted the February 6 termination letter as evidencing Rodriguez' true motivation for termination. The letter stated that:

> "My decision is primarily based on your conduct of December 20, 1975, which I regard as unbecoming an officer of this department."

The relevant portion of Special Interrogatory No. 1 stated:

> "We, the jury, find that the principal reason Amador Rodriguez decided to discharge Eliseo Garza was that he criticized the police before his employer and others [on December 20, 1975], . . ." (Appendix at 1a)

Finally, and appropriately, petitioner's following paragraph is so devoid of relevancy so as not to deserve a reply from Rodriguez:

> "Further substantiation of the integrity of the jury verdict is that, subsequent to the trial, Rodriguez himself, unlike Garza, was convicted of a misdemeanor (driving while intoxicated), but was not terminated from his job. Garza requested the Court of Appeals to judicially notice the official court records of that conviction."

CONCLUSION

Only with the petitioner's distorted and inaccurate analysis of the Court of Appeals for the Fifth Circuit

decision, unsupported by the complete records of the case, can it be said that a federal question was decided in such a way as to conflict with *Mt. Healthy*. Nor does the Court of Appeals' decision require the supervision of the Supreme Court of the United States. As petitioner accurately points out, it has been appropriate with different factual situations to remand cases for a *Mt. Healthy* hearing. However, as petitioner further points out, the Court of Appeals for the Fifth Circuit is quite learned on the guidelines of *Mt. Healthy*, and has, in fact, remanded at least one case to the District Court for a *Mt. Healthy* hearing. *Stewart v. Bailey*, 556 F.2d 281, *reversed and remanded*, 561 F.2d 1195 (1977). The Court of Appeals correctly and thoroughly evaluated this Court's decision of *Mt. Healthy* and in doing so, correctly applied the law stated therein to the facts at bar. The Petition should be denied.

Respectfully submitted,

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Attorneys for Respondent,
Amador Rodriguez

By: _____
ORRIN W. JOHNSON,
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CERTIFICATE

I, Orrin W. Johnson, a member of the Bar of the Supreme Court of the United States and Counsel of Record for Amador Rodriguez, Respondent herein, hereby certify that on September ____, 1978, pursuant to Rule 33, Rules of the Supreme Court, I served one copy of the foregoing Reply to Petition for Writ of Certiorari to United States Court of Appeals for the Fifth Circuit, on Eliseo Garza, Petitioner herein, by depositing said copy in the United States Post Office, Harlingen, Texas, with first class postage pre-paid, properly addressed to the Post Office address of James C. Harrington, the above named Petitioner's Counsel of record, at the American Civil Liberties Union Foundation—South Texas Project, Box 1493, San Juan, Texas 78589.

All parties required to be served have been served.

DATED: September ____, 1978.

_____
ORRIN W. JOHNSON,

APPENDIX

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

CA NO. 76-B-65

ELISEO GARZA

v.

AMADOR RODRIGUEZ, ET AL.

JUDGMENT

The above entitled action having been tried before a jury on May 6 and May 7, 1976, and the jury having answered Special Interrogatories as follows:

Special Interrogatory No. I

We, the Jury, find that the principal reason Amador Rodriguez decided to discharge Eliseo Garza was that he criticized the police before his employer and others, and because Mr. Garza eventually filed suit against officers of the Brownsville Police Department.

Special Interrogatory No. II

We, the Jury, find that the actions of Eliseo Garza did not impede proper performance of his daily duties as an employee of the Juvenile Probation Department or substantially impede the legitimate operation of the Department.

Special Interrogatory No. III

Plaintiff suffered actual damages to the present date in the amount of $-0-.

Special Interrogatory No. IV

Plaintiff will suffer damages in the form of loss of future earnings as is reasonably certain to result directly from Defendants' actions in the amount of $-0-.

Special Interrogatory No. V

We, the Jury, find that Amador Rodriguez did not know or reasonably should have known that the action he took would violate the constitutional rights of Eliseo Garza, and that Amador Rodriguez did not act with the malicious intention to cause a deprivation of constitutional rights or other injury to Eliseo Garza.

and the Court having filed its order of September 3, 1976, setting out certain supplemental findings pursuant to Rule 49(a), Federal Rules of Civil Procedure;

It is therefore ORDERED, DETERMINED, ADJUGED, AND DECREED:

1. That Defendants are hereby enjoined, ordered, and directed to reinstate Plaintiff Eliseo Garza in his position as investigator in the Juvenile Probation Department of Cameron County, Texas, as of the date of signing of this final judgment.

2. That Defendants are hereby enjoined, ordered, and directed to restore to Plaintiff credit for vacation time taken from him after March 12, 1976.

3. That Defendants are perpetually enjoined and restrained from further obstructing or punishing Plaintiff for exercising his constitutional rights and from further attempts to dismiss Plaintiff for any cause arising prior to March 12, 1976.

4. That Defendants' actions violated Plaintiff's rights of freedom of expression and of due process of law under the First and Fourteenth Amendments of the Constitution of the United States and 42 U.S.C. § 1983.

5. That Plaintiff recover of Defendants his costs of action.

SIGNED this 3rd day of September 1976.

/s/ OWEN D. COX
United States District Judge

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

CA NO. 76-B-65

ELISEO GARZA

v.

AMADOR RODRIGUEZ, ET AL.

MEMORANDUM AND ORDER

Eliseo Garza, the Plaintiff herein, was an employee of Cameron County in the Juvenile Probation Department. He had been with that department for several months and had been promoted to the post of an investigator shortly before the December 20, 1975 incident occurred. In such capacity, as the Court understands it, he was answerable to Amador Rodriguez, the Director of the Department, who was answerable, in turn, to one of the State District Judges in Cameron County, Texas, who was then acting as the Juvenile Court Judge. The facts which happened on said date, as the Court finds them to be relate to the matter of Plaintiff Garza's dismissal from the Juvenile Probation Department. Pursuant to Rule 49(a), the Court makes the following additional findings in order to supplement the findings of the jury with regard to any omitted issues.

On the night in question, Garza and his girl-friend had been to a party and both admitted to having had six drinks of bourbon and Coca Cola. The term "six drinks" really means very little unless you know whether the drinkers were using a jigger or sloshing the bourbon into

a glass from the bottle. In any event, about one o'clock in the morning, or perhaps a little bit later, Garza and his girlfriend left the party. They had had a disagreement and, because of this, Garza parked his pickup truck in which they were riding at some place in a city park there in Brownsville because he wanted to discuss their problem. While so engaged, a police car drove up and stopped. A policeman stepped down, went to the passenger's side of Defendant's truck, and asked the young lady if Garza was giving her any trouble. There was a passenger in the police car. Both Garza and his girlfriend testified that they were not saying anything at this moment, but the policeman's inquiry indicates otherwise.

In any event, after having talked to the young lady, the officer went around to the driver's side of the pickup and asked Garza for his driver's license. Garza objected to producing his driver's license, but began to search in the glove compartment of the pickup for his identification card. No justifiable reason was given by Garza for his failure to show his license. Apparently he would not show the police officer his driver's license because he was not driving at the time, which, of course, was not plausible. At this point in the testimony, it was clear to this Court, as it must have been to the police officer at the time, that Garza was not sober and that, as a result of his inebriated condition, Garza was belligerent and evidenced a demand for some sort of preferential treatment because he was a probation officer. When Garza was unable to locate his I.D. card, and because he had refused to produce his driver's license, the officer took him out of the truck, arrested and handcuffed him. We note that at this time the evidence shows the police officer was solicitous of Garza's girlfriend

because of her predicament. We see no fault on the part of the police officer at this point.

Garza was then taken to the county jail. To what extent, if any, the other individual in the police car participated in the arrest of Garza in getting him to the county jail is not clear. As the Court recalls the testimony, at some point one of the officers sprayed mace in Garza's face in order to subdue him. He was taken to the booking room in the sheriff's office. Here, Plaintiff claimed he was further abused. But, this Court need not decide the extent of such abuse, if any, as was dealt to Garza at this time and it will not do so. There is, however, little doubt that while being booked Mr. Garza was himself abusive of the jail officials and used foul language as to everyone who seemed to be close at hand. Garza's claim was that the mace had blinded him, that he was disoriented and just didn't know where he was.

One of the first things Garza asked for after he was inside the jail at the booking desk was a telephone. He told the jailer that he wanted to call his superior in the Juvenile Probation Department, Amador Rodriguez. The jailer called Rodriguez for Garza. This, however, upset Garza, who had apparently changed his mind about talking to Rodriguez. In any event, and pursuant to the telephone call, Rodriguez went to the jail and while he was trying to find out what the problem was, Garza cursed him along with everybody else. Garza was finally calmed down and after a while the jail officials permitted Rodriguez to take Plaintiff Garza home.

Sometime during the next day or so, Amador Rodriguez talked to Garza about the incident and Garza was concerned about what might happen to him. Garza was

told he could be suspended for ninety days or he might be discharged. At the time of the conference, the Court concludes there was just cause to terminate Garza's employment because of his behavior on December 20th.

Several weeks passed during which nothing was said between Rodriguez and Garza about the incident. Garza continued with his work as an investigator in the Juvenile Probation Department and seemingly was performing satisfactorily. Then, Amador Rodriguez was advised by a member of the District Attorney's staff in Cameron County, Texas, at a chance meeting, that Garza had filed a civil suit against the city policemen who had arrested him, claiming civil rights violations in connection with his arrest and incarceration. After receiving such information, Rodriguez called Garza into his office and told him that he should not have brought the lawsuit without first advising Rodriguez of what he intended to do. As Director of the Juvenile Probation Department, Rodriguez told Garza that he was concerned about the effect such a lawsuit might have on the Juvenile Probation Department's relationship with the Police Department. Rodriguez shortly thereafter did confer with the Juvenile Court Judge in Cameron County, Texas, as to what action should be taken. Subsequently, Amador Rodriguez told Garza, because of all the circumstances, he was fired.

This Court is of the opinion that had Rodriguez fired Garza shortly after the incident in the park and the disturbance which carried on into the jail, he would have been within his authority in doing so, and Garza would have had no legal recourse for such action. However, having waited several weeks, as he did, Rodriguez may have been, as the Court views it, on shaky ground.

However, we are not here concerned with the compensatory and the punitive damages to which Garza may have been entitled to receive. The jury gave him nothing.

What we must now decide is whether or not Garza should be reinstated as an investigator with said Cameron County Juvenile Probation Office. As far as the Court was concerned, his refusal to show his driver's license and his insistence on identifying himself as a juvenile probation officer was certainly unbecoming an officer in any department. While the Court has already concluded that the facts relating to this matter were such as to authorize, at one point in this story, the termination of Garza's employment, we must, however, still answer the question of whether or not the delayed firing was of such doubtful validity as to require the Juvenile Probation Department to reinstate the Plaintiff. This Court concludes that Eliseo Garza should be reinstated in the position as an investigator in the Juvenile Probation Department of Cameron County, Texas, as of the date of the final judgment in this case, which will be signed and ordered entered as of the date of this Memorandum and Order.

Plaintiff requests injunctive relief ordering Defendants to restore to Plaintiff credit for vacation time taken from him after March 12, 1976. Since the findings of the jury, and the supplemental findings of this Court, have established that Plaintiff was improperly discharged, Plaintiff should not have been forced to take vacation time after March 12, 1976. This relief will be granted.

Plaintiff requests injunctive relief enjoining Defendants and their employees and agents from further obstructing or punishing Plaintiff for exercising his constitutional

rights and from further attempts to dismiss Plaintiff for any cause arising prior to March 12, 1976. The Court is convinced that Defendants will abide by the determination of Plaintiff's rights made in this case, and that Defendants will not "further obstruct or punish Plaintiff for exercising his constitutional rights." Therefore, at this time the Court will deny this relief.

The complaint requests declaratory relief that Defendant's actions violated Plaintiff's rights of freedom of expression, and of due process of law, in violation of the First, Fifth, and Fourteenth Amendments of the Constitution of the United States, and of 42 U.S.C. § 1983. This relief will be denied.

The complaint prays for actual damages in the amount of $10,000 and punitive or exemplary damages in the amount of $25,000. The jury's answers to Special Interrogatories Nos. III and IV found against Plaintiff on the issue of actual damages. Punitive damages are recoverable in section 1983 actions in certain circumstances. *Palmer v. Hall,* 517 F.2d 705 (5th Cir. 1975); *Mansell v. Saunders,* 372 F.2d 573 (5th Cir. 1967); 14 A.L.R. Fed. 608 (1973). In general, however, punitive damages may be imposed only if a defendant has "acted wilfully and in gross disregard for the rights of the complaining party." *Lee v. Southern Home Sites Corporation,* 429 F.2d 290 (5th Cir. 1970). This issue overlaps substantially with the finding of the jury in Special Interrogatory No. V, and, if necessary, the Court makes the additional finding that the evidence in this case did not justify the imposition of punitive damages.

Finally, the complaint requests that Plaintiff recover costs and "a reasonable attorney's fee." Plaintiff's request

for costs will be granted, but attorney's fees will not be allowed. The mere fact that litigation involves "issues of civil rights does not in itself justify an award of attorney's fees." *Roane v. Callisburg Independent School District,* 511 F.2d 633 (5th Cir. 1975); *Hander v. San Jacinto Junior College,* 519 F.2d 273 (5th Cir. 1975). Plaintiff has not shown that Defendants "acted in bad faith, vexatiously, wantonly, or for oppressive reasons." *Alyeska Pipeline Service Co. v. The Wilderness Society,* 421 U.S. 240 (1975). Again, Special Interrogatory No. V is relevant to this issue, and the Court makes the additional finding that Plaintiff did not present evidence to bring this case within one of the attorney's fees exceptions of *Alyeska, supra.*

Copies of this Memorandum and Order shall be furnished to appropriate counsel.

SIGNED this 3rd day of September, 1976.

/s/ OWEN D. COX
United States District Judge